

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID R. DURAN)	
Claimant)	
VS.)	
)	Docket No. 1,019,160
JOE'S PAINTING)	
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the June 1, 2005, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

Claimant alleges he injured his left knee while working for his brother's company, Joe's Painting. The Application for Hearing indicated claimant was injured from performing his normal job duties. But claimant testified at his December 2, 2004, preliminary hearing that he fell off a ladder on or about January 27, 2004, and experienced minor pain that worsened over the next few days, causing him to seek medical treatment.

In the June 1, 2005, Order, Judge Barnes held that claimant developed his knee injury due to the work he performed for respondent. The Judge also determined respondent had timely notice of the accident and timely written claim. Accordingly, the Judge granted claimant's request for medical benefits.

Respondent and its insurance carrier contend Judge Barnes erred. They argue claimant failed to prove: (1) he injured his left knee in an accident that arose out of and in the course of his employment with respondent, (2) he provided respondent with timely notice of the accident or injury, and (3) he provided respondent with a timely written claim for workers compensation benefits. Consequently, respondent and its insurance carrier ask the Board to deny claimant's request for benefits.

The issues before the Board on this appeal are:

1. Did claimant injure his left knee in an accident that arose out of and in the course of employment with respondent?
2. Did respondent have timely notice of claimant's alleged accident or injury as required by K.S.A. 44-520?
3. Did claimant prove respondent received a timely written claim for workers compensation benefits as required by K.S.A. 44-520a?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

Claimant worked for his brother as a touch-up painter. Claimant alleges he fell approximately four or five feet from a ladder and experienced mild pain in his left knee. Claimant testified he believed the accident occurred on or about January 27, 2004, which was two days before he saw Dr. Diana Ketterman. But the medical records presented at the preliminary hearing indicate that claimant saw Dr. Mueeza Zafar on January 15, 2004, complaining that his left knee was swollen and painful.

Dr. Zafar's notes from January 15, 2004, indicate claimant told the doctor his symptoms began a week earlier and that he could "not remember any associated injury."¹ Nonetheless, the doctor noted claimant was a painter who kneeled, climbed ladders, bent over, and lifted heavy objects. Dr. Zafar wrote, in part:

Patient's left knee is painful and swollen. Symptoms started 1 week ago. Does not remember any associated injury. Pain started gradually and hae [sic] progressively become worse. Worsens with weight bearing, and radiates to the left hip. Denies any distal numbness, weakness or paraesthesias. Patient is a painter and has to kneel to do baseboards, ladder climbing, bending over, lifting heavy objects etc. He is also active in basketball etc.²

The record is not entirely clear but it appears claimant returned to his doctor on January 29, 2004, but this time saw Dr. Diana Ketterman. After obtaining an MRI that indicated claimant had a complex meniscal tear in his left knee, Dr. Ketterman referred claimant to Dr. Bradley W. Bruner. Dr. Ketterman's office notes from the January 29, 2004, appointment are not in the record. When claimant saw Dr. Bruner on May 27, 2004, the doctor noted claimant had been experiencing left knee pain for four to five months.

¹ P.H. Trans., Resp. Ex. 1.

² *Id.*

Respondent and its insurance carrier also introduced a document from the Laboratory Corporation of America, which contained handwritten notes from Dr. Zafar's office that indicated claimant had "crackles in his knee – kneels a lot working – no specific injury. . . ."³

Joe Duran, who is claimant's brother and who owns Joe's Painting, testified by deposition. Joe Duran testified that he saw claimant limping in either December 2003 or January 2004 and that claimant advised he did not know how he had injured his knee. Joe Duran also denies that claimant or claimant's son, Todd Duran, ever advised him that claimant fell off a ladder or that claimant injured his left knee at work.

Moreover, Joe Duran testified he did not know claimant was alleging he had injured his left knee at work until July 2004, when claimant asked him to prepare an accident report. Joe Duran complied but wrote "unknown" on the form where it asked for the date of accident, how the accident occurred, what claimant was doing at the time of the accident, and the object or substance that caused the injury.

This record fails to satisfy claimant's burden that he injured his left knee working for respondent. The medical records do not substantiate claimant's allegation that he injured his knee by falling from a ladder. And the record does not include a doctor's opinion that claimant's injury arose from his work activities. Accordingly, the June 1, 2005, Order should be reversed.

Based upon the above, the issues of timely notice and timely written claim are moot.

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.⁴

WHEREFORE, the Board reverses the June 1, 2005, Order. Claimant's request for benefits is denied.

IT IS SO ORDERED.

³ *Id.*

⁴ K.S.A. 44-534a(a)(2).

Dated this ____ day of July, 2005.

BOARD MEMBER

c: Gary E. Patterson, Attorney for Claimant
James P. Wolf, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director